Single Bench

IN THE HIGH COURT OF JUDICATURE AT BILASPUR

CHHATTISGARH

Criminal Appeal No.598/2005

APPELLANT : Nand Kumar Singh Thakur
In Jail
S/o Gajadhar Singh
Aged about 27 years
R/o Village- Bija,
P.S. Takhatpur,Distt. Bilaspur (C.G.)

VERSUS

RESPONDENT : State of Chhattisgarh
Through Station House Officer
P.S. Kota, Distt. Bilaspur (C.G.)

CRIMINAL APPEAL U/S. 374 (2) OF Cr.P.C.

(26)

HIGH COURT OF CHHATTISGARH AT BILASPUR

Criminal Appeal No. 683/2005

Budhram Singh Maravi

Vs.

State of Chhattisgarh.

Criminal Appeal No.598/2005

Nand Kumar Singh Thakur

Vs.

State of Chhattisgarh

Single Bench: Hon'ble Shri **Dilip Raosaheb Deshmukh, J.**

Present:
Shri Atul Pandey, learned counsel for the appellant **Budhram Singh Maravi.**
Shri Shailendra Dubey, learned counsel for the appellant **Nand Kumar Singh Thakur.**
Shri Ashish Shukla, learned G.A. for the State.

JUDGMENT

(Delivered on 29th day of August 2006)

This judgment shall govern Criminal Appeal No.683/2005 by Budhram Singh Maravi and Criminal Appeal No.598/2005 by Nand Kumar Singh Thakur. Both appellants were convicted under Section-8 & Section-20(b)(ii)(B) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 'the Act') and were sentenced to undergo rigorous imprisonment for 4 years and a fine of Rs.5,000/-, and in default of the same, to undergo additional R.I. for one month vide judgment dated 12-07-2005 delivered by Shri A.K.Pradhan, Special Judge (N.D.P.S.), Bilaspur in Special Criminal Case No.03/2005.

2. Brief facts are that Inspector N. Khalkho PW-5 received secret information that the appellant Budhram along with his companion was in unauthorized possession of ganja at his house in Village-Dhanras. After recording the said information vide Ex.P-1, he proceeded to the house of appellant Budhram at Village-Dhanras. The appellant Nand Kumar Singh Thakur was sleeping on a cot. Three plastic bags were kept beneath the cot. On being searched, they were found to contain 20 packets of ganja. The house of Budhram was also searched and from one room contraband Ganja kept in one bag was recovered. Weighment was got done. Ganja recovered from the house of Budhram in one plastic bag containing 7 packets was found to weigh 7 K.G. i.e. 1 packet of 1 K.G. each whereas 20 packets seized from the appellant Nand Kumar Singh Thakur were found to weigh 20 K.G. But of these 20 samples of 250 Grams each were separated from each plastic bag seized from the appellant Nand Kumar and similarly 7 samples of 250 grams each were separated from the ganja seized from the house of appellant Budhram. The samples as also the remaining articles were sealed by the Inspector N. Khalkho PW-5 who was the Officer-in-charge of Police Station-Kota at the relevant time. Two sample packets prepared from the ganja seized from each appellant were entrusted to Head Constable Santosh Yadav of Police Station-Kota for safe custody on 17-11-2004. On 23-11-2004, with memo Ex.P-32 of Superintendent of Police, Bilaspur two sealed packet of 250 grams each were delivered for chemical analysis to the Forensic Science Laboratory by Constable Rajju on 25-11-2004. Vide report Ex.P-39 of Forensic Science Laboratory, it was opined that both the sample packets contained ganja. After completion of investigation, the appellants were prosecuted.

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3. The appellants abjured the guilt, pleaded innocence and led no evidence in defence. The prosecution examined 5 witnesses. Relying upon the evidence led by the prosecution, the learned trial Judge convicted and sentenced the appellants as aforesaid in para-1. (Supra)

4. Shri Shailendra Dubey, learned counsel for the appellant Nand Kumar and Shri Atul Pandey, learned counsel for the appellant Budhram have assailed the conviction of the appellants on the ground that the malkhana register was not produced by the prosecution. Reliance was placed on **State of Rajsthan Vs. Gurmail Singh** reported in **Volume-I (2005)CCR 228 (SC)**. It was also contended that although 27 samples packets were prepared yet Ex.P-37 and P-38 revealed that only 4 sample packets were entrusted for safe custody to Head Constable Santosh Yadav without explaining for the custody of the remaining articles and the sample packets. Head Constable Santosh Yadav was also not examined by the prosecution. Thus, the vital link evidence was missing and it could not be ruled out that the samples examined by the Forensic Science Laboratory could have been tampered with. The specimen impression of the seal affixed on seizure memos were wholly illegible and did no match with the specimen impression of the seal drawn on the report Ex.P-39 of the Forensic Science Laboratory. The memo of Superintendent of Police did not show the name of the constable to whom the samples were entrusted for being taken to the Forensic Science Laboratory. Lastly, it was contended that due to non-compliance of the mandatory provision of Section-42(2) of the Act by Inspector N. Khalkho PW-5, conviction of the appellants was liable to be set aside. Reliance was placed on **Mohinder Kumar Vs. The State, Panaji, Goa** reported in

A.I.R. 1995-Supreme Court-1157. On the other hand, Shri Ashish Shukla, learned Govt. Advocate argued in support of the impugned judgment.

5. Having considered rival submissions, I have perused the record. In view of the deterrent punishment provided for the offences under the Act., it is the duty of the prosecution to prove that the sanctity of the articles and the sealed samples prepared therefrom was not breached at any time till the samples reached the Forensic Science Laboratory. In the present case, the prosecution did not produce the malkhana register for the reasons best known to it. Although, the testimony of Inspector N. Khalkho PW-5 revealed that 20 sample packets were prepared from the ganja seized from the Nand Kumar and 7 samples were prepared from the ganja seized from the appellant Budhram yet no explanation was offered as to why only two samples prepared from the articles seized from each appellant alone were entrusted through acknowledgment slips only i.e. Ex.P-37 & P-38. There is no explanation why entry was not made in the Malkhana Register and also for non production thereof. Seal affixed on the seizure memo Ex.P-27 and Ex.P-13 is wholly illegible and does not match with the specimen impression of the seal drawn by the Forensic Science Laboratory its report Ex.P-39. The memo of Superintendent of Police Ex.P-32 also does not mention that specimen impression of the seal was also sent with the sample packets. It also does not mention the name of the Constable to whom the sample packets were entrusted. There is absolutely no evidence to show that the samples were entrusted to Constable Rajju PW-2 in a sealed condition. His testimony is as vague as it could be. It does not show that the samples were received by him in a sealed condition. Thus, in the aforesaid

circumstances relying upon the case of State of Rajsthan Vs. Gurmail Singh reported in Volume-I (2005)CCR 228 (SC),I am of the considered opinion that there are serious loop holes in the prosecution case regarding the sealing of the samples as also the entrustment thereof as mandated by Section-55 of the Act. The link evidence adduced by the prosecution is wholly unsatisfactory and renders the prosecution story extremely doubtful.

6. As regards the non-compliance of Section-42(2) of the Act, although the prosecution has filed a document Ex.P-2 yet it does not show that the superior police officers had received the information sent by Sub Inspector N. Khalkho PW-5. Sub Inspector N. Khalkho PW-5 has admitted that at no time after recording the secret information did he inform his superior officers of the grounds for his belief to search the house of Budhram. Thus, there is a serious violation of the mandatory provision of Section-42(2) of the Act. In view of the dictum of the Apex Court in Mohinder Kumar Vs. The State, Panaji, Goa reported in A.I.R. 1995-Supreme Court-1157, conviction of the appellants is liable to be set aside only on this count.

7. Possession is the core ingredient of an offence under Section-8 and Section-20(b)(ii) (B) of the Act. Prosecution has failed to prove that the appellants were in conscious possession of the contraband articles. Independent witnesses Satel Ram PW-1 did not support the prosecution story and stated that he was called at the Police Station and was made to sign all documents. Another Independent witness Pardeshi Ram Vaishnav was not examined by the prosecution for which there is no explanation. An adverse inference is drawn against the prosecution on that count. Patwari Chandrika Prasad Kashyap PW-3

admitted that the appellants were not present at the time when he prepared the spot map Ex.P-35. The testimony of Inspector N. Khalkho PW-5 clearly shows that the appellant Nand Kumar was sleeping on the cot, beneath which three plastic bags were kept. The house did not belong to the appellant Nand Kumar and therefore, it could not be said that the contraband ganja was recovered from the conscious possession of the appellant Nand Kumar. Similarly, the testimony of N. Khalkho PW-5 did not show as to whether other family members of appellant Budhram were present in the house. There is no legal evidence on record to show that the house from which ganja was alleged to have been seized belonged to appellant Budhram. The testimony of Inspector N. Khalkho PW-5 in para-5 also did not give any cogent reason for the conscious possession of appellant Budhram over the contraband ganja alleged to have been seized from one of the rooms of the house of Budhram. The testimony of Patwari Chandrika Prasad Kashyap PW-3 who prepared the spot map Ex.P-35 wholly demolishes the testimony of Inspector N. Khalkho PW-5 that the ganja was recovered from inside the room of the house of the appellant Budhram, since it clearly shows that the ganja was recovered from the *Galiyara*. Thus, there is no cogent evidence to show that the ganja was seized from the conscious possession of appellant Budhram.

7. Having thus considered the evidence led by the prosecution in its entirety, I am of the considered opinion that conviction of the appellants under Section-8 & Section-20 (b) (ii) (B) of the Act and the sentences awarded thereunder by the learned trial Judge are liable to be set aside.

8. In the result, both Criminal Appeal No.683/2005 and Criminal Appeal No.598/2005 are allowed. Conviction of the appellants under Section-8 & Section-20 (b) (ii) (B) of the Act and the sentences awarded thereunder by the learned trial Judge are set aside. The appellants are acquitted and shall be set at liberty forthwith, if not required in any other case. Fine, if paid, shall be refunded.

Sd/-
Dilip Raosaheb Deshmukh
Judge